



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-A-

DATE: MAY 23, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an electrical engineer, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that the Director misapplied the *Dhanasar* framework by considering the U.S. Department of State's refusal of his nonimmigrant visa in his analysis.

Upon *de novo* review, we will withdraw the decision of the Director and remand the petition for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term “national interest,” we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.¹ *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor’s merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual’s education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national’s qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national’s contributions; and whether the national interest in the foreign national’s contributions is

¹ In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998) (*NYSDOT*).

sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.²

II. ANALYSIS

As indicated in the Director's decision, the record demonstrates that the Petitioner qualifies as a member of the professions holding an advanced degree.³ The sole issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

At the time of filing, the Petitioner was a postdoctoral researcher at [] University in Canada. His research focused on the design and fabrication of electronic circuits and semiconductor sensors, including biosensors proposed to detect early stage cancer, as well as the fabrication of micro-electrical-mechanical systems, or MEMS. The Petitioner has stated his intent to continue this work in the United States.

In a notice of intent to deny (NOID) issued to the Petitioner, the Director provided notice of adverse information under 8 C.F.R. § 103.2(b)(16)(i). Specifically, the Director noted that the Department of Homeland Security records show that the Petitioner had previously been refused a nonimmigrant visa twice by the U.S. Department of State under section 306 of the Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543, 555, related to aliens from countries that are state sponsors of international terrorism.

Based on this information, the Director concluded in the denial decision that, given the discretionary nature of the waiver requested by the Petitioner, it would not be in the national interest of the United States to grant a national interest waiver of the job offer requirement, and thus the labor certification requirement, to the Petitioner. Upon review, we will remand this decision for the Director's further consideration of the merits under the second and third prongs of the *Dhanasar* framework.

A. Substantial Merit and National Importance of the Proposed Endeavor

The Director found that the Petitioner's proposed endeavor in the areas described above had substantial merit, particularly with regards to the potential health benefits of early detection of cancer through the development of biosensors, and the possible economic impacts of improvements to semiconductor fabrication methods. The national importance of these endeavors was also supported in several reference letters. We agree with the Director and conclude that the Petitioner meets the requirements of the first prong of the *Dhanasar* framework.

² See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

³ The Petitioner submitted copies of his diploma and official academic transcript from the University of [] with certified translations, which show that he earned a Ph.D. in Nano Electronics in 2012. See 8 C.F.R. § 204.5(k)(3)(i)(A).

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner. In initially conducting his analysis, the Director properly considered the Petitioner's academic degrees, authorship of scholarly articles, established record of success in his field, and multiple prospects for employment in support of his proposed endeavor in the United States. However, upon review of this evidence, the Director stated that "it appears the alien petitioner is well positioned to advance the proposed endeavor." This statement does not signal a conclusive determination.

In addition, after completing his second prong analysis without making a determination, the Director later indicated that due to the State Department's prior refusals of his nonimmigrant visa applications under section 306 of the Enhanced Border Security and Visa Reform Act of 2002, the Petitioner may be unable to advance his research in the United States and would therefore not meet the second prong. In so doing, he introduced a factor into the second prong analysis, admissibility, which is not only beyond the scope of the *Dhanasar* framework, but is not properly considered in the adjudication of an immigrant visa petition. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (holding that the visa petition procedure is not the appropriate forum for finding an alien inadmissible). Accordingly, on remand the Director should analyze the evidence submitted in support of the Petitioner's positioning to advance the proposed endeavor, and make a conclusive determination without considering his previous, and possible future, inadmissibility.

C. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, the third prong requires the Petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. The *Dhanasar* decision explains that the purpose of this test is to balance the national interest in protecting the domestic labor supply through the labor certification process with the Congressional recognition that "other factors" also in the national interest may outweigh it.

On appeal, the Petitioner asserts that these other factors are limited to those which relate to labor market protections or measure the benefit of facilitating the foreign national's employment in the United States by bypassing the labor certification process. While the *Dhanasar* decision lays out several possible factors that may be considered, which include those intended to remove regulatory barriers and delays for those whose services are deemed to sufficiently serve the national interest, we note that the factors mentioned are not exhaustive or meant to limit the types of factors that may affect, positively or negatively, the national interest in granting the waiver.⁴

However, in his decision the Director did not perform the required balancing test under the third prong. While he references the Petitioner's assertion that his skills and "essential qualities" cannot be captured in the minimum requirements for the position which are articulated on a labor certification, the Director merely notes the similarity of this argument to an example provided in a footnote to the

⁴ The decision stated that USCIS "may evaluate factors *such as*" those listed (emphasis added). *Id.* at 890-91. It went on to emphasize that "in each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification."

Dhanasar decision, without providing an analysis of the factors involved. Therefore, on remand the Director should conduct a complete analysis of the Petitioner's arguments under the third prong.⁵

D. Exercise of Discretion

In addition to his analysis under the three prongs of the *Dhanasar* framework, the Director also concluded that a favorable exercise of discretion was not supported in this case. We noted in *Dhanasar* that, even if all three prongs of the framework have been met, USCIS "may approve the national interest as a matter of discretion." *Dhanasar* at 889. Footnote 9 adds that given the "purely discretionary" nature of the national interest waiver, it must be shown that "the foreign national otherwise merits a favorable exercise of discretion." *Id.*⁶ Therefore, should the Director find that the Petitioner meets all three prongs of the *Dhanasar* framework, he should then consider whether the Petitioner otherwise merits a favorable exercise of discretion and should be granted a national interest waiver.

III. CONCLUSION

The Petitioner has established his eligibility under the EB-2 classification, and that his proposed endeavor has substantial merit and national importance in accordance with the first prong of the *Dhanasar* framework. However, we are remanding the petition for the Director to consider whether the Petitioner meets the second prong, absent considerations regarding his admissibility, as well as to conduct a complete analysis under the third prong. If the Director finds that the Petitioner has met all three prongs, he should then consider whether the Petitioner merits a favorable exercise of discretion to grant a national interest waiver.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-A-*, ID# 2227161 (AAO May 23, 2019)

⁵ As we noted in our discussion under the second prong, admissibility is not a proper consideration in an analysis under the *Dhanasar* framework, or in the adjudication of an immigrant visa petition.

⁶ This broad discretion is supported by the language of section 203(b)(2)(B)(i) ("the Attorney General *may*, when the Attorney General *deems* it to be in the national interest, waive the requirements of subparagraph (A)").